UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 2000,

Plaintiff,

-vs-

Case No. 6:03-cv-362-Orl-22DAB

AGERE SYSTEMS INC.,

Defendant.

ORDER

I. INTRODUCTION

This cause comes before the Court for consideration of the Defendant's, Agere Systems, Inc., Dispositive Motion for Summary Judgment (Doc. No. 20), and memorandum of law in support thereof (Doc. No. 21), filed December 9, 2003, to which the Plaintiff, International Brotherhood of Electrical Workers Local 2000, responded (Doc. No. 47) on January 8, 2004; and the Plaintiff's, International Brotherhood of Electrical Workers Local 2000, Corrected Motion for Summary Judgment (Doc. No. 41), filed December 15, 2003, to which the Defendant, Agere Systems, Inc., responded (Doc. No. 43) on December 22, 2003. Having reviewed the motions and memoranda, this Court DENIES the Defendant's, Agere Systems, Inc., Dispositive Motion for Summary Judgment (Doc. No. 20), and DENIES the Plaintiff's, International Brotherhood of Electrical Workers Local 2000, Corrected Motion for Summary Judgment (Doc. No. 41). Since it is undisputed that the matter at issue in this instance is subject to arbitration, there is nothing left for this Court to determine. It is for the

arbitrator to decide which arbitration procedure (*i.e.*, regular or expedited) applies. *See Bell Atlantic - Pennsylvania, Inc. v. Communications Workers of Am., AFL-CIO, Local 13000*, 164 F. 3d 197 (3rd Cir. 1999).

II. BACKGROUND

The Defendant, Agere Systems, Inc. (hereinafter, "Agere" or "the Company"), is a provider of advanced integrated circuit solutions for wireless data, high-density storage, and multi-servicing network applications.[1] Until June of 2002, it was a public subsidiary of Lucent Technologies, Inc. (hereinafter, "Lucent").[2] Currently, Agere maintains a manufacturing facility located in Orlando, Florida (hereinafter, "the Orlando facility").[3] The Plaintiff, International Brotherhood of Electrical Workers Local 2000 (hereinafter, "Local 2000" or "the Union"), is a recognized bargaining unit at Agere.[4] It represents certain hourly production and maintenance employees at the Orlando facility.[5] This action involves a labor dispute implicating the Labor Management Relations Act of 1947, 29 U.S.C. § 141, et seq (hereinafter, "the LMRA").[6]

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[1]*See* Joint Pretrial Statement (Doc. No. 53), ¶ 1 at 5. Many portions of the background section of this order were taken verbatim from the parties' stipulations of fact as stated in the Joint Pretrial Statement (Doc. No. 53).

[2]*See id.*, ¶3 at 5.

[3]*See id.*, ¶4 at 5.

[4]*See id.*, ¶5 at 5.

[5]*See id.*

[6]*See generally* Complaint (Doc. No. 1).

In 1998, Lucent and Local 2000 entered into a Collective Bargaining Agreement effective May 31, 1998 to May 31, 2003 (hereinafter, "the General Agreement").[7] Inasmuch as Agere was a public subsidiary of Lucent at the time the General Agreement was entered into,[8] its terms and conditions apply to Agere.[9]

As is typical in almost all collective bargaining agreements, the General Agreement in this instance contains a dispute resolution process.[10] In relevant part, that provision reads:

> **1. General**
>
> (a) Any dispute arising between the UNION and the COMPANY with respect to the interpretation of any provision of this Agreement or the performance of any obligation hereunder may be referred, during the life of this Agreement, to an Arbitrator in accordance with the procedures hereinafter set forth, provided:
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> (1) The procedure for the settlement of grievances, ARTICLE 6 - GRIEVANCE PROCEDURE, has been exhausted, and
>
> (2) Such dispute does not involve a provision of this Agreement which specifies that it is not subject to arbitration and,

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[7]*See* Joint Pretrial Statement (Doc. No. 53), ¶6 at 5.

[8]*See id.*, ¶3 at 5.

[9]*See id.*, ¶6 at 5.

[10]*See id.*, ¶7 at 5-6.

(3) Such dispute does not involve a case in which the determination of the matter in dispute is within the judgment or discretion of the COMPANY.[11]

Allegedly, this framework provides for the "expeditious and mutually satisfactory settlement of grievances arising with respect to the interpretation or application of [the] [General] Agreement or other terms and conditions of employment."[12]

On February 19, 2001, Lucent, on behalf of itself and Agere, entered into a second agreement with Local 2000; a supplement to the General Agreement.[13] The supplement, entitled Memorandum of Agreement (hereinafter, "the MOA"), governs subcontracting and outsourcing concerns.[14] Specifically, it prohibits the Company from subcontracting or

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[11]General Agreement, Article 7, ¶1 at pg. 27 (emphasis in the original).

[12]General Agreement, Article 6, ¶1 at 22.

[13]*See* Joint Pretrial Statement (Doc. No. 53), ¶8 at 6.

[14]*See* Memorandum of Agreement, ¶3 at 290-91. In relevant part, the MOA reads:

3. This Agreement sets forth the understandings reached as to the following:

(a) the treatment to be afforded eligible employees in a production and maintenance and/or salaried bargaining unit represented by the Union when a decision by the Company to subcontract or outsource work performed by bargaining unit employees, or work that is or has been traditionally performed by bargaining unit employees, directly results in the layoff, termination or separation of employees in the bargaining unit.

(b) a notification and information sharing process shall apply with respect to the subcontracting or outsourcing of any production or salaried work performed by bargaining unit employees, or work that is, or has been traditionally performed by such bargaining unit employees.

outsourcing unless it first notices the Union of its decision, engages the Union in dialogue, and shares information regarding the proposed subcontracting or outsourcing with the Union (the notification, commitment to dialogue, and exchange of information provisions will hereinafter be referred to as "the Notification to the Union provisions").[15] The MOA reads, in relevant part, as follows:

> 7. A new provision shall be added to the applicable collective bargaining agreements titled "Subcontracting and Outsourcing of Production or Salaried Graded Work - Notification to Union." The provision shall read:
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> ---
>
> (c) a notification and information sharing process that shall apply with respect to the sale of a business or the spin off of a business which directly results in the layoff, involuntary termination or involuntary separation of employees in the bargaining unit.
>
> (d) The parties agree that a "Sale of the Business" shall not be construed as subcontracting or outsourcing for the purpose of triggering the benefits set forth in subparagraphs 5(a) through (g) herein; provided, however, the Company's Columbus, Oklahoma City and Agere facilities shall be handled separately as provided in the side letters dealing with those facilities.
>
> It is further understood by the parties that a "spinoff" by the Company shall not be construed as subcontracting or outsourcing within the meaning of this Memorandum of Agreement provided the "spinoff" company is fully bound and obligated by all provisions set forth in the applicable collective bargaining agreement(s) between the Company and the Union, as modified by this Memorandum of Agreement."

[15] *See id.*, ¶7 at 298-99.

"**Subcontracting and Outsourcing of Production or Salaried Graded Work - Notification to the Union.**["] The Company shall not subcontract or outsource any production or salaried graded work performed by the bargaining unit employees, or work that is, or has been, traditionally performed by bargaining unit employees, unless all of the following conditions have been satisfied.

(1) Prior to any decision to subcontract or outsource bargaining unit work, the Company will provide the Union with written notice that it intends to consider the use of subcontracting and outsourcing. . . The purpose of this notice will be to engage the Union in meaningful discussion concerning the possibility of such subcontracting or outsourcing, and to examine any proposals by the Union that will maintain the work and job security of bargaining unit members.

(2) The Company will share all information that is relevant to the subcontracting or outsourcing of production or salaried graded work. In addition, the Company agrees to meet with the Union on a regular basis to engage in dialogue prior to making a final decision to subcontract or outsource the production or salaried graded work.

(3) No final decision by the Company to subcontract or outsource any production or salaried graded work performed by bargaining unit employees, or work that is, or has been, traditionally performed by bargaining unit employees, shall be made until after the Union has been notified in writing of the Company's decision or, in any event, prior to the Company's compliance with the provisions of subparagraphs (1) and (2).[16]

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[16] *Id.*, ¶7 at 298-299.

Importantly, disputes involving the Notification to the Union provisions are not subject to the grievance and arbitration provisions located in the General Agreement.[17] Instead, they are subject to expedited arbitration.[18] However, the authority of the arbitrator in any expedited arbitration is extremely limited:

> (d) The parties agree that the issue to be determined by the neutral third party under this special resolution process is limited to whether the Company violated the "Notification to the Union" provisions set forth in this provision. The neutral third party shall not, under this process, be empowered to determine issues relating to whether the Company has a right to subcontract or outsource bargaining unit work. Any issues that arise between the parties relating to whether the Company has a right to subcontract or outsource bargaining unit work are reserved for resolution through the traditional grievance process set forth in the agreement under Articles 6 and 7, it being understood that each party is permitted to raise any appropriate claims or defenses, including arbitrability.[19]

With these provision in effect, Agere directed work away from its Orlando facility to its facilities in the Far East.[20] In addition, it directed work to an outside company, entitled United Test and Assembly Center, Ltd. (hereinafter, "UTAC").[21] As a result, the Union filed

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[17]*See* Joint Pretrial Statement (Doc. No. 53), ¶10 at 6.

[18]*See* Memorandum of Agreement, ¶5 at 299.

[19]*Id.*, ¶5(d) at 300.

[20]*See* Joint Pretrial Statement (Doc. No. 53), ¶14-15 at 7.

[21]*See id.*, ¶17 at 7.

a grievance alleging, *inter alia*, that the Company outsourced without complying with the Notification to the Union provisions of the MOA.[22]

In a letter dated August 14, 2002, the Company denied the Union's grievance:

> As you know, we have consistently advised you that . . . work was not outsourced to a third party, but was, in fact, moved to our own facilities in Bangkok and Singapore. Of course, movement of work between Agere facilities is not outsourcing, and therefore, your grievance is not subject to the expedited arbitration procedures of the MOA.
>
> The parties agreed that the issue to be determined by the neutral third party under this special resolution process is limited to whether the Company violated the "Notification to the Union" provisions set forth in this provision. The neutral third party shall not, under this provision, be empowered to determine issues relating to whether the Company has the right to subcontract or outsource bargaining unit work . . .
>
> [T]he expedited arbitration provision is only available to determine whether the company violated the "Notification to the Union" procedure set forth in the MOA and not to questions of arbitrability, which remain subject to the traditional grievance process set forth in the collective bargaining agreement.[23]

In response to this correspondence, the Union demanded arbitration.[24] However, for the same reasons as cited in the August 14, 2002 letter, the Company refused.[25]

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[22]*See id.*, ¶18 at 7.

[23]Complaint (Doc. No. 1), Ex. C at 1-2 (emphasis in the original).

[24]*See* Joint Pretrial Statement (Doc. No. 53), ¶19 at 8.

[25]*See id.*, ¶20 at 8.

Against that backdrop, Local 2000 filed a Complaint in the United States District Court for the Middle District of Florida seeking a declaration that its grievance is subject to the expedited arbitration provision of the MOA, and further seeking an order compelling the Defendant to arbitrate in accordance with the expedited arbitration provision.[26]

Turning to the issue at hand, the Company and the Union now move this Court for summary judgement.[27] In that connection, the Company argues that, as a matter of law, the expedited arbitration provision is inapplicable.[28] Conversely, the Union argues that, as a matter of law, the expedited arbitration provision is applicable.[29]

III. STANDARD OF REVIEW

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it is one that might affect the outcome of the case. *See id.* The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those materials that

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[26]*See* Complaint (Doc. No. 1) at 4-5.

[27]*See generally* Docs. No. 20, 21, 22 and 41.

[28]*See generally* Docs. No. 20, 21, and 22.

[29]*See generally* Doc. No. 41.

demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant satisfies this requirement, the burden shifts to the non-moving party to "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 (1986). To meet this burden, the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings." Fed. R. Civ. P. 56(e). Nor may the non-moving party rely on a mere scintilla of evidence supporting their position. *See Walker v. Darby*, 911 F. 2d 1573, 1577 (11th Cir. 1990). Rather, for a court to find a genuine issue for trial, the non-moving party must establish, through the record presented to the court, that it is capable of providing evidence sufficient for a reasonable jury to return a verdict in its favor. *See Cohen v. United Am. Bank*, 83 F. 3d 1347, 1349 (11th Cir. 1996). When a court considers whether or not to enter summary judgment, it views all of the evidence, and all inferences drawn therefrom, in the light most favorable to the non-moving party. *See Hairston v. Gainesville Sun Publ'g Co.*, 9 F. 3d 913, 918 (11th Cir. 1993).

IV. LEGAL ANALYSIS

It is well established that "[s]ection 301 of the Labor Management Relations Act, codified at 29 U.S.C. § 185, authorizes federal courts to create a body of federal labor law to govern the interpretation and enforcement of collective bargaining agreements, consistent with, among other goals, the clear congressional policy in favor of agreements to arbitrate labor disputes." *Dist. No. 1 - Marine Eng'rs Beneficial Ass'n, AFL-CIO v. GFC Crane Consultants, Inc.*, 331 F. 3d 1287, 1290 (11th Cir. 2003) (internal citation omitted). However,

"[b]efore ordering specific performance of an agreement to arbitrate, [courts] must first determine whether the parties have agreed to arbitrate the particular matter at issue." *Id.* (internal citation omitted).

In this instance, it is undisputed that the parties have agreed to arbitrate the particular matter at issue: outsourcing. As the Defendant has repeatedly acknowledged, "[t]his is not a case about *whether* to arbitrate, but about the *type* of arbitration procedure that is appropriate." Memorandum of Law in Support of Defendant's Dispositive Motion for Summary Judgment (Doc. No. 21) at 1 (emphasis in the original). Indeed, "Agere has never taken the position that the issue of outsourcing is not arbitrable. Rather, Agere . . . maintain[s] that whether a particular action constitutes outsourcing is arbitrable under the General Agreement, [] not the MOA." *Id.* at 8.; *see also* Defendant's Response in Opposition to Local 2000's Memorandum of Law in Support of Motion for Summary Judgment (Doc. No. 43) at 1 ("It bears repeating that this is not a case about *whether* to arbitrate, but about the *type* of arbitration procedure that is appropriate") (emphasis in the original); Joint Pretrial Statement (Doc. No. 53) at 2 ("This is not a case about *whether* to arbitrate, but about the *type* of arbitration procedure that is appropriate") (emphasis in the original). Thus, the issue presented for this Court is whether the parties should arbitrate this dispute pursuant to the procedure detailed in the General Agreement or pursuant to the procedure detailed in the MOA.

Well-settled United States Supreme Court precedent establishes that where parties "agree[] to submit all questions of contract interpretation to the arbitrator" the function of a

district court is "confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Paperworkers Int'l Union, ALF-CIO v. Misco, Inc.*, 484 U.S. 29, 36-37 (1987) (quoting *Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567-68 (1960)); *see also Interstate Brands Corp., Merita Bread Bakery Div. v. Local 441 Retail, Wholesale & Dep't Store Union, AFL-CIO*, 39 F. 3d 1159, 1161-62 (11th Cir. 1994) (accord). This precludes district courts from considering "procedural" questions arising tangential to an arbitrable dispute.

Indeed, as Justice Harlan summarized in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964):

> Once it is determined . . . that the partes are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.

Id. at 557.

To hold otherwise would present the possibility of serious "delay attendant upon judicial proceedings preliminary to arbitration" entirely eliminating "the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties (who, in addition, will have to bear increased costs) and contrary to the aims of national labor policy." *Id.* at 558. Thus, when "arbitrability of the subject matter is unquestioned but a dispute arises over the procedures to be followed" the issue is one for the arbitrator. *See id.*

The decision rendered in *Bell Atlantic - Pennsylvania, Inc. v. Communications Workers of Am.*, 164 F. 3d 197 (3rd Cir. 1999) is instructive on this point.

There, the union and company entered into a collective bargaining agreement which provided for both regular and expedited arbitration. *See id.* at 199. Like the instant case, however, a disagreement arose concerning which type of arbitration applied. *See id.* The union sought regular arbitration, whereas the company sought expedited arbitration. *See id.* at 199.

On cross-motions for summary judgment, the United States District Court for the Eastern District of Pennsylvania ruled in favor of the company. *See id.* After concluding that it had the authority to rule upon the applicability of one arbitration provision over another (*i.e.*, expedited or regular), the district court ordered the union to submit to an expedited arbitration procedure. *See id.*

On appeal, the Court of Appeals for the Third Circuit reversed. *See generally id.* Finding it outside the province of a district court to rule on the applicability of one type of arbitration procedure over another, the appellate court criticized the lower court's ruling as follows:

> The fundamental error of the District Court was its expansion of the basic substantive arbitrability question ("whether or not the company was bound to arbitrate") into a much broader inquiry, one that falls outside of the substantive arbitrability domain ("whether the particular arbitration clause covers the subject matter of the particular dispute between the parties"). Such an expansion is unwarranted. It is inconsistent with this Courts' and the Supreme Court's precedents in this area and it is not dictated by the policy concerns behind the substantive arbitrability doctrine.

Id. at 202.

Like the company in *Bell*, the Company here concedes that it is bound to arbitrate the underlying dispute. Accordingly, "[a]llowing an arbitrator to determine which procedure will be used does not force [the Company] to arbitrate any disputes that it believed it was withholding from arbitration -- unlike the situation when the basic determination of whether or not an underlying dispute is arbitrable is sent to an arbitrator." *Id.* For that reason, the proper course of action in this instance is to submit both the outsourcing issue and the procedural issues raised by the Union and the Company to the arbitrator. A contrary conclusion would invite cost and delay into the resolution of this labor dispute, frustrating the aim of our national labor policy, and depriving the parties the benefit of their collective bargaining agreement. Moreover, it would require this Court to exceed the bounds of its authority. Manifestly, it is not within the province of this court to entertain questions beyond whether the parties disagreement falls within the purview of an arbitration agreement. In this instance, it unquestionably does.

V. CONCLUSION

Based on the foregoing, it is **ORDERED** that:

1. The Defendant's, Agere Systems, Inc., December 9, 2003 Dispositive Motion for Summary Judgment (Doc. No. 20) is **DENIED**. It is not within the province of this Court to decree the expedited arbitration procedure inapplicable.

2. The Plaintiff's, International Brotherhood of Electrical Workers Local 2000, December 15, 2003 Corrected Motion for Summary Judgment (Doc. No. 41) is **DENIED**. It is not within the province of this Court to decree the expedited arbitration procedure applicable.

3. The parties shall **SUBMIT TO ARBITRATION** both the underlying outsourcing/subcontracting dispute, and the dispute involving the appropriate arbitration procedure to follow. *See Bell Atlantic - Pennsylvania, Inc. v. Communications Workers of Am., AFL-CIO, Local 13000*, 164 F. 3d 197 (3rd Cir. 1999).

4. The Clerk of Court shall **CLOSE** the file.

5. The Clerk of Court shall **REMOVE** this case from the April trial calendar.

6. All other pending motions are **DENIED** as **MOOT**.

7. In light of this Court's ruling, denying both parties judgment as a matter of law, the Plaintiff's, International Brotherhood of Electrical Workers Local 2000, request for attorneys' fees and costs is **DENIED**. This matter should have been submitted to arbitration at the outset, and with the Company steadfastly seeking regular arbitration, and the Union steadfastly seeking expedited arbitration, it can be stated with reasonable certainty that both parties are responsible for this protracted litigation.

DONE and **ORDERED** in Chambers, in Orlando, Florida this 10th day of March, 2004.

ANNE C. CONWAY
United States District Judge

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